



The relief described hereinbelow is SO ORDERED.

Signed October 18, 2006.

A handwritten signature in cursive script that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

VERA A. FEAGANS,
Debtor.

Case No. 06-20049
Chapter 13

MEMORANDUM AND ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

Confirmation of Debtor's Chapter 13 plan is currently pending before the Court.¹ Debtor Vera A. Feagans appears by counsel David A. Reed. Creditor and objecting party AmeriCredit Financial Services, Inc. ("AmeriCredit"), appears by counsel Phyllis Schauffler. The value of a 2002 Pontiac Aztek motor vehicle is the issue. Based upon the testimony presented at an evidentiary hearing on July 21, 2006, and arguments of counsel, the Court finds the Debtor did not meet her burden of challenging the Creditor's valuation of the Aztek. Confirmation of Debtor's Chapter 13 plan is denied.

Factual Matters

Debtor filed her Chapter 13 petition and proposed plan on January 19, 2006. The plan

¹ This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (K), and (L).

listed AmeriCredit as the secured creditor on the Aztek. Debtor estimated the value of the Aztek to be \$6,825.00. On January 26, 2006, AmeriCredit filed a proof of claim for a total of \$15,168.65, allocating \$11,600.00 as secured and \$3,568.65 as unsecured. AmeriCredit then filed an Objection to Confirmation of Plan on February 3, 2006 (Doc. No. 12), alleging that the Kelley Blue Book private party value of the Aztek was \$7,690.00 as of the petition date.

The Court set valuation for an evidentiary hearing on July 21, 2006. Debtor failed to appear and, as a result, failed to provide any evidence as to value. AmeriCredit presented testimony of LeeAnn Bohm. Ms. Bohm was qualified as an expert without objection. Ms. Bohm has been a licensed vehicle sales person since before 1990, has owned her own dealership in Topeka for three years, and has conducted appraisals for two years. In appraising the Aztek, Ms. Bohm viewed the car and took a drive with the Debtor. Ms. Bohm did not have a complete mechanical inspection done. After her inspection, Ms. Bohm prepared a written appraisal, which was admitted into evidence without objection. The appraisal referenced the National Automobile Dealers Association (“NADA”) guide for various market values.

The vehicle appraisal report, supplemented with Ms. Bohm’s testimony, described the Aztek as having 40,468 miles and being in above average condition. Ms. Bohm testified that the air conditioning was not working according to the Debtor. All other systems and options performed well. The NADA values ranged from \$8,250 for loan value to \$10,525 for trade-in and \$12,750 for retail. Ms. Bohm testified that the car would actually sell for about \$1,000 more at the time of the valuation hearing in July as opposed to the petition date in January because of the cyclical nature of the used car market. In summary, Ms. Bohm opined that the car would have sold retail between \$9,240 and \$10,900 in January 2006 and could have sold retail for \$1,000 more in July 2006. Ms. Bohm stated the wholesale value of the car was holding steady at

about \$8,250 according to NADA, and she would expect to buy the car for resale for \$7,500 to \$8,000 and sell the car off her lot for \$9,750.

Discussion

A. Standard for Valuing Security Interest for Purposes of Plan Confirmation.

This case requires the Court to value property under 11 U.S.C. § 506(a)(2) of the revised Code.² The valuation question comes before the Court as an objection to confirmation. Section 1325(a)(5) specifies whether a plan is confirmable based upon the treatment of allowed secured claims. If other confirmation criteria are met, a Chapter 13 plan shall be confirmed if it satisfies any one of three alternative treatments for each allowed claim provided for in the plan. Since AmeriCredit does not accept the plan,³ and the Debtor does not intend to surrender the Aztek,⁴ the proposed plan shall be confirmed if the Debtor complies with the Chapter 13 cramdown provisions.⁵ The cramdown provisions basically provide that when the debtor retains the property, the creditor retains its lien, and the debtor's plan must pay for the value of the allowed secured claim as of the confirmation date.⁶ Determining the value of the allowed secured claim is governed by § 506.

Section 506(a)(2) is a new revision under BAPCPA. When interpreting a statute, the Court examines the language and employs its common meaning, provided the result is not absurd

² The Bankruptcy Abuse Prevention Consumer Protection Act of 2005 ("BAPCPA") became effective in cases filed after October 17, 2005.

³ 11 U.S.C. § 1325(a)(5)(A).

⁴ 11 U.S.C. § 1325(a)(5)(C).

⁵ 11 U.S.C. § 1325(a)(5)(B).

⁶ *Id.*; *Evabank v. Baxter*, 278 B.R. 867, 875 (N.D. Ala. 2002).

or contrary to legislative purpose.⁷ Revised § 506(a)(2) reads as follows:

If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

The statute prescribes the rules for valuation depending upon the nature of the collateral. First, if the property is personal property in a Chapter 7 or 13, the valuation standard is replacement cost determined as of the petition date without deduction for costs of sale or marketing. Further, if the debtor acquired the property for personal, family, or household purposes, the property is valued at the time of the valuation hearing with the age and condition of the property considered in determining a retail replacement price. The timing of valuation depends upon the property's use. Property acquired for personal, family, or household purposes is valued at the time of the valuation hearing, which in this case is the confirmation hearing.⁸ All other personal property is valued as of the petition date, but only in Chapter 7 and 13 cases.⁹

Prior to the 2005 Code revisions, the Supreme Court set the standard for valuing property retained by Chapter 13 debtors under § 1325 and § 506.¹⁰ *Rash* held that such value is the price a willing buyer in the debtor's situation would pay to obtain like property from a willing seller.¹¹ *Rash* directed that replacement cost must be used in order to give meaning to the language of

⁷ *Dalton v. Internal Revenue Service*, 77 F.3d 1297, 1299 (10th Cir. 1996).

⁸ 4 COLLIER ON BANKRUPTCY ¶506.03[10] at 506-100 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2006).

⁹ The first sentence of § 506(a)(2) does not apply to cases under Chapters 11 and 12.

¹⁰ *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 963, 117 S. Ct. 1879, 1885-86 (1997).

¹¹ *Rash*, 520 U.S. at 960, 117 S. Ct. at 1884.

§ 506(a)(1)¹² which states, “[V]alue shall be determined in light of the purpose of the valuation and of the proposed disposition and use of such property....”¹³ The foregoing language remains in the revised Code. However, *Rash* did not hold that replacement value was necessarily retail value. Rather, *Rash* left courts free to choose a hypothetical market (*e.g.*, wholesale, retail, garage sale), based upon the evidence presented, the type of debtor, and the nature of the property.¹⁴ Even so, *Rash* noted that replacement value, even if defined by a retail market, should not include value for items not received by a debtor retaining his vehicle such as warranties and reconditioning.¹⁵

Section 506(a)(2) has been described as a codification of *Rash*.¹⁶ However, whereas *Rash* did not definitively state which market would be used as a guide to determine replacement cost, § 506(a)(2) definitively sets replacement cost for a certain class of property as the price a retail merchant would charge for property of that kind considering its age and condition. Thus, under § 506(a), the value of personal property acquired by a Chapter 13 debtor for personal, family, or household purposes is the price a retail merchant would charge, but taking into consideration the age and condition of the property, which, like *Rash*, would exclude value for items not actually received by the debtor such as reconditioning and warranties.

The Aztek shall be valued according to the foregoing standard as of the hearing date.

¹² Congress did not substantively change pre-revision § 506(a); however, with the addition of § 506(a)(2), § 506(a) became renumbered as § 506(a)(1).

¹³ *Rash*, 520 U.S. at 963, 117 S. Ct. at 1885-86.

¹⁴ *Rash*, 520 U.S. at 965 n.6, 117 S. Ct. at 1886 n.6.

¹⁵ *Id.*

¹⁶ *In re Mayland*, 2006 WL 1476927 (Bankr. M.D. N.C. 2006); 8 COLLIER ON BANKRUPTCY ¶1325.06[3][b] at 1325-46 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2006).

The parties stipulated that the Debtor purchased the Aztek for personal, family, and household use. The witness testified as to a range of values as of both the petition date in January 2006 and the date of the valuation hearing in July 2006. Only the latter valuations are relevant here.

B. Burden of Proof

Generally, the debtor bears the burden to prove that the requirements for plan confirmation have been met.¹⁷ However, when, as here, confirmation hinges upon the value of a creditor's collateral, the creditor objecting to the plan has the ultimate burden of persuasion to support the value of its claim.¹⁸ In this case, the Debtor's burden is to rebut the evidence introduced in support of the objection to confirmation.¹⁹ The burden then shifts to AmeriCredit to persuade the Court on the value of its claim.²⁰

The Debtor failed to appear and failed to carry her burden to rebut AmeriCredit's evidence. The Debtor's failure to appear means basically a default judgment in favor of AmeriCredit. AmeriCredit's evidence is the only evidence the Court has to consider in valuing the Aztek. Accordingly, this Memorandum will be of limited guidance to debtors and creditors who may later participate in a valuation hearing actually contested.

C. The Evidence

Ms. Bohm is a retail merchant and testified the Aztek was in above-average condition, with low mileage, and good options. As for the malfunctioning air conditioner, the evidence was

¹⁷ *Tillman v. Lombard*, 156 B.R. 156, 158 (E.D. Va. 1993).

¹⁸ *In re Mendenhall*, 54 B.R. 44, 45 (Bankr. W.D. Ark. 1985).

¹⁹ *In re Roberts*, 210 B.R. 325, 328 (Bankr. N.D. Iowa 1997).

²⁰ *Id.*; see also *Evabank*, 278 B.R. at 878.

inconclusive. The witness did not know the source of the problem and stated the repair could be a simple \$300 recharging or a \$1,700 overhaul. Ms. Bohm's values assumed a functioning air conditioner. Ms. Bohm further testified that she would spend approximately \$100 on reconditioning before placing the car on the lot. She would sell it for \$9,750.

In setting the value in this case, the Court is limited to the opinion testimony of one witness. While the values given by the Creditor's witness seemed high and were more favorable to the party who presented the witness, the Court must consider the case as submitted. Nevertheless, this case illustrates how actual sales price by (at least one) retail merchant is not based solely on market guides such as NADA and Kelley Blue Book. In other words, just because market guides say they reflect "retail" value does not mean they reflect a realistic retail sales price. For example, the NADA market guide in this case placed a retail value for the Aztek at \$12,750; however, Ms. Bohm testified that she would sell the car off her lot for \$9,750. Of course, Ms. Bohm's opinion was based upon the actual vehicle under consideration, unlike the NADA guide, and the difference may reflect the age and condition of this particular vehicle, but not entirely. This Aztek has low miles, is in above-average condition, and has desirable features. Additionally, Ms. Bohm did not deduct anything for the broken air conditioner. Based upon the testimony presented, this Aztek would seem to be the standard for an accurate market guide valuation, and yet, NADA's value is \$3,000 higher than the sales price of the Creditor's own witness. Further, the witness's value still included items not allowed by *Rash* in a retail valuation such as reconditioning. Accordingly, the retail replacement value for the Aztek shall be the sales price as testified by the one retail merchant to take the stand, less the cost of repairing the air conditioner, and less the cost for *Rash* items not actually received by a debtor

retaining her vehicle.

The Court reaches a value of \$9,350. Starting with the \$9,750 retail sales price, the Court deducted the \$100 for reconditioning. The witness acknowledged that at least \$300 would be required to recharge the air conditioner. Without any rebuttal testimony of a higher repair cost, the Court deducted \$300 for repairs.

D. Conclusion

For the foregoing reasons, AmeriCredit's Objection to Confirmation of Plan is sustained. The plan may later be confirmed provided it is amended to reflect a value of \$9,350 for AmeriCredit's allowed secured claim.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS